CHAPTER 8

PRIVILEGES IN CONTRACT LITIGATION

I. INTRODUCTION.

A. Failure to exercise care in this area of the law assures outcomes ranging from client dissatisfaction and wasted attorney time to the compromise of national security.

B. Scope: This class will describe the most-frequently encountered privileges, present the issues their invocation might raise, suggest practical concerns, and discuss problems.

C. Applicable Rules.

1. Fed. R. Civ. P. 26(b)(1) - "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . [or any matter that] appears reasonably calculated to lead to the discovery of admissible evidence."

2. COFC rule 26(b) is identical.

3. ASBCA permits discovery of "documents or objects not privileged, which reasonably may lead to the discovery of admissible evidence." Rule 15. Otherwise, board follows Fed. R. Civ. P. Appeal of Ingalls Shipbuilding Division, Litton Systems, Inc., ASBCA No. 17717, 73-2 BCA ¶ 10,205.

D. Privileges Most Commonly Encountered in Contract Litigation.

1. Attorney-Client.

2. Attorney Work Product.

3. Governmental.

a) State Secret.

b) Deliberative Process.

c) Others.

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(1) Informant's.

(2) Investigatory Files.

(3) Privilege For Information Given To The Government On A Pledge Of Confidentiality.

(4) Confidential Report.

E. General Principles.

1. "[A]ssertion of privileges is strictly construed because privileges impede full and free discovery of the truth." Energy Capital Partners Ltd. v. U.S., 45 Fed. Cl. 481, 483 (2000) (citing cases).

2. "In order to do substantial justice in the highly complex factual disputes that are presented to us for determination, we think it appropriate to give the general principle favoring discovery a broad application, and to construe the exceptions thereto narrowly." Ingalls Shipbuilding Division, Litton Systems, Inc., ASBCA No. 17717, 73-2 B.C.A. para.10,205.

3. Privileges may be arranged in a hierarchy that reflects the degree to which, once properly invoked, they can be dislodged. Generally, this hierarchy reflects the degree to which a privilege has a Constitutional underpinning.

4. As rules stray farther from the Constitution for their bases, public policy concerns play a larger role in determining their applicability. Accordingly, privilege advocacy must consider a privilege's purpose and whether invocation of the privilege would serve that purpose.

5. "Washington Post Rule" - Before invoking privilege, realize that you are the face of the government. Consider also that the plaintiff is among the governed. In short, within the bounds of your duty to your client, consider whether a claim of privilege, which, in essence, is an assertion of government secrecy, comports with the larger public interest and whether the public would think so.

6. Before invoking privilege consider first whether documents at issue are responsive – if not, you don't have a privilege problem.

a) BUT, at this stage, relevance is broadly construed. FRCP 26(b)(1) (only matters "relevant to the subject matter involved in the

pending action" or "reasonably calculated to lead to the discovery of admissible evidence" are discoverable.)

b) "No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the fact underlying his opponent's case." Hickman v. Taylor, 329 U.S. 495, 507 (1947). Accord Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978) (discovery exceeds "issues raised in pleadings"); Appeal of Ingalls Shipbuilding, 73-2 BCA ¶ 10,205. As a practical matter, judges loathe having to decide whether something is discoverable and even more so deciding that it IS non-discoverable.

c) Determinations are ad hoc, but remember what is good for the goose is good for the gander, so be careful where you set the bar. It will limit your advocacy for more liberal treatment later on. (On the other hand, don't expect your generosity to be repaid in kind).

d) This means requests also should be liberally construed – unless you are certain the judge will find them to be as off the mark as you do.

(1) BUT, if you guess wrong, you will pay the price, ranging from judge's wrath (accusing you of "nitpicking") to sanctions.

7. Party asserting privilege has the burden. E.g., Fisher v. United States, 425 U.S. 391 (1976); Appeal of Southwest Marine, Inc., DOTBCA Nos. 1497 et al, 87-2 BCA ¶ 19,769.

8. In lawsuits in which the government is not a party, agency Touhy regulations require parties seeking agency information from former and current employees to notify agency of information sought. Employees must obtain authority before disclosing such information. Touhy regulations permit agencies to determine whether to invoke privileges with regard to sought-after information. See United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951).

II. ATTORNEY-CLIENT PRIVILEGE.

A. Rationale.

1. Encourage solicitation of legal advice "to promote broader public interests in the observance of law and administration of justice." Upjohn Co. v.

United States, 449 U.S. 383, 389 (1991).

B. Elements.

1. "The privilege attaches to communications made by a client, or a person seeking to be a client, to an attorney, outside the presence of third parties for the purpose of securing legal services." Cabot v. United States, 35 Fed. Cl. 442, 444 (1996) (citing United States v. Shoe Machinery Corporation, 89 F. Supp. 357, 358 (D. Mass. 1950); Upjohn, 449 U.S. at 395; Appeal of B.D. Click, 83-1 BCA ¶ 16,328.

a) United States v. Shoe Machinery Corporation formulation:

(1) (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court [and] . . . (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

2. May be invoked by United States. United States v. Procter & Gamble, 356 U.S. 677, 681 (1958).

3. Applies to agency counsel advising Government. National Labor Relations Bd. v. United States, 421 U.S. 132, 154 (1975).

C. Who is the client?

1. Government employees serving in official capacity. Deuterium Corp. v. U.S., 19 Cl. Ct. 697, 699-700 (1990); Appeal of Storage Technology Corp, GSBCA No. 11306-P, 91-3 BCA ¶ 24,253 at 121,257 (communications to government counsel from government employees "at all levels" eligible); Appeal of B.D. Click, 83-1 ¶ BCA 16,328 at 81,173.

2. One who seeks to become a client. Standards of conduct "briefing" by JAG attorneys to officer re: conflict of interest regulations held covered where officer completed card describing himself as client and attorneys answered his questions. United States v. Schaltenbrand, 930 F.2d 1554

(11th Cir.), cert. denied, 112 S. Ct. 640 (1991).

3. The agency attorney as client. Cities Service Helix, Inc. v. U.S., 216 Ct. Cl. 470, 476 (1978); Town of Norfolk v. U.S. Army Corps of Eng'rs., 968 F.2d 1438 (1st Cir. 1992) (DOJ letters to agency protected).

4. Can extend to former employees.

D. What Is Protected?

1. The lawyer's and the client's communication. Upjohn, 449 U.S. at 383, 390-91; Eagle-Picher Indus., Inc. v. United States 11 Cl. Ct. 452, 456 (1987). Appeal of B. D. Click, 83-2 BCA ¶ 16,328 (communication protected if it "exposes the confidentiality expected by the client," and includes the fact the communication was made, the facts contained in the communication, and the manner in which it was described, including the order and omission of facts). But see Carter v. Gibbs, 909 F.2d 1450 (Fed. Cir. 1990) (privilege applies only to client communications).

2. Which communications? Depends on circuit. Spectrum ranges from those that might reveal the confidence to all related to the purpose of the confidence. See "The Attorney-Client Privilege and The Work Product Doctrine - March 1994 OGC Deskbook," Department of the Navy (Barlow et al) (1984) (unpublished), 4-8.

3. Attorney may be deposed under proper circumstances. Sparton Corporation v. United States, 44 Fed. Cl. 557 (1999) (citing three-part test of Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986)).

E. Must be disclosed in order to obtain legal advice or assistance. Thus, mere communication of information to a lawyer is not protected. E.g., Appeal of Ingalls Shipbuilding, 73-2 BCA ¶ 10,205 (but look for implied request).

F. Must be made in confidence and expected to be retained in confidence.

1. May be disclosed to agents of the attorney and others assisting the attorney in providing legal advice, if intended to remain in confidence.

2. In-house persons? Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 863 (D.C. Cir. 1980) ("If facts have been made known to persons other than those who need to know them, there is nothing on which to base a conclusion that they are confidential").

3. Detailed factual showing needed to establish that independent contractors have special relationship to corporation and transaction giving rise to the need for legal services, Energy Capital, 45 Fed. Cl. 481, 490-91.

4. Joint defense.

   a) An extension of the A-C privilege. E.g., B.E. Meyers & Co., Inc. v. United States, 41 Fed. Cl. 729, 731 (1998). Applies to clients in a litigated or non-litigated matter, with a common legal interest, who agree to exchange information concerning the matter, and have not waived the privilege.

G. Waiver

1. Must be asserted and protected at all turns. (Thus, fair interrogatory is: "for any claim of privilege, identify all occasions on which the privileged matter was disclosed to any person other than the attorney to whom the communication was originally made.")

2. It is the client, not the attorney who may waive. Cities Service Helex, Inc. v. U.S., 219 Ct. Cl. 765 (1977); Appeal of B.D. Click, 83-1 BCA ¶ 16,328; Appeal of Ingalls Shipbuilding, 73-2 BCA ¶ 10,205.

3. The A-C privilege "can be waived by the client or prospective client only if the communication is later disclosed to a third party and the client either did not take adequate steps in the circumstances to prevent the disclosure . . . ." B.E. Meyers & Co., Inc. v. United States, 41 Fed. Cl. 729, 731 (1998).

4. Putting advice in issue. E.g., United States v. Mendelsohn, 896 F.2d 1183 (9th Cir. 1990) (defendant made attorney advice an issue by asserting that the advice confirmed his activities were lawful - only advice about that matter required to be disclosed).

5. Discussion of attorneys advice among management does not waive privilege. Appeal of B.D. Click, 83-1 BCA ¶ 16,328.

6. Putting the protected information at issue and denying opponent information vital to defending that issue requires a finding of waiver. Afro-Lecon, Inc. v. United States, 820 F.2d 1198, 1204-05 (Fed. Cir. 1987).

7. What is waived?

a) Depends on circuit, ranging from only matter communicated to all communications on subject matter. In re Sealed Case, 877 F.2d 976 (D.C. Cir. 1989) (company's disclosure to government auditor = waiver, even if inadvertent; district court to determine scope of subject matter).

b) Genentech v. United States Int'l. Trade Comm'n., 122 F.3d 1409 (Fed. Cir. 1997). Court considered whether 12,000 pages of documents inadvertently released in district court proceeding, found by lower court to have been released due to lax screening procedure, waived A-C privilege and work product protection. Considered whether breach of confidence should be limited to district court, and rejected the idea, noting that "a small number of courts" have done so, but Fed. Cir. never has. Cited Carter v. Gibbs for proposition that "[g]enerally disclosure of confidential communications or attorney work product . . . constitutes a waiver of privilege as to those items." Genentech at 1415. Later in the opinion stated: "[o]nce the attorney-client privilege has been waived, the privilege is generally lost for all purposes and in all forums." Id. at 1416.

H. Inadvertent Waiver.

1. What is it?

a) National Helium Corp. v. U.S., 219 Ct. Cl. 612 (1979) (no per se waiver for inadvertent disclosure. Test is whether "the [screening] procedure followed was so lax, careless, or inadequate that plaintiff must objectively be considered as indifferent to disclosure or anything which happened to be shown to the Government).

b) Where appellant assembled 137,142 pages of documents in a 31-day period, it had ample time (government performed its review in two days). Failure of appellant to demonstrate that it had a screening technique or undertook any limited review did not support claim that disclosure was "inadvertent." Appeal of General Dynamics, DOTBCA No. 1232, 83-1 BCA ¶ 16,284.

2. Does it waive? Depends upon circuit.

a) Federal Circuit - ??

(1) Cat's out of the bag approach. Carter v. Gibbs, 909 F.2d 1452 (Fed. Cir. 1990). Appeal of Pinner Construction, VA

BCA Nos. 1712, 1852, 2273, 2274 & 2301, 87-2 BCA ¶ 19,886 (citing Appeal of Southwest Marine, Inc., 87-2) (agreeing with DOTCAB that "weight of authority and better reasoned cases" hold that intent to waive is not a precondition to waiver and that it can occur inadvertently; VABCA also recognized that inadvertent disclosure may not constitute waiver where effectively compelled, such as an order to produce 17 million pages in three months).

(2) National Helium Corp., 219 Ct. Cl. 612 (no per se waiver for inadvertent disclosure).

(3) IBM v. U.S., 37 Fed. Cl. 599 (1997) (Carter v. Gibbs did not overrule National Helium because the former was not decided en banc, as is necessary to overrule Court of Claims precedent). See also B.E. Meyers & Co., Inc. v. United States, 41 Fed. Cl. 729 (1998); International Business Machines Corp. v. United States, 37 Fed. Cl. 599 (1997); Telephonics Corp. v. United States; 32 Fed. Cl. 360 (1994).

3. Effect of inadvertent waiver agreements.

4. Basis for advocacy.

a) Intent. National Helium, 219 Ct. Cl. at 616 (test is did "the client wish to keep back the privileged materials and did he take adequate steps in the circumstances to prevent disclosure of such document."). See also United States v. Moscony, 927 F.2d 742 (3rd Cir.). cert. denied, 111 S. Ct. 2812 (1991) (unsophisticated lay person held not to understand that he was waiving).

b) Care shown. National Helium, 219 Ct. Cl. at 615.

5. If shown to witness to refresh recollection before trial, different analysis. See FRE 612.

I. Particular Situations.

1. Updates not following a client communication?

2. Staff meeting with attorney present.

3. Letter forwarded to attorney "FYI."

4. Should you advise clients not to put sensitive matters in writing?

5. Providing common-sense business advice?

a) No. E.g., Cabot v. United States, 35 Fed. Cl. 442, 444-445 (1996).

6. KO testifies her decision was not an abuse of discretion because she relied upon advice of counsel (beware of opponent attempting to boot strap, by asking "did you rely on advice of counsel?" and then asking about advice.)

J. Conclusion. - There is plenty of room for advocacy by the seeker and no room for complacency of the communicator.

III. WORK-PRODUCT DOCTRINE.

A. Rule.

1. Generally, a qualified protection for work performed by a party when litigation is anticipated or underway, which can be overcome by a showing of necessity.

2. Hickman v. Taylor, 329 U.S. 495 (1947). Attorneys and plaintiffs ordered imprisoned for failure to disclose witness statements taken from third parties. Affirming appellate court reversal of district court, Supreme Court held: "Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney."

a) Court noted that, with respect to the lawyer's remembrance or selective notes of oral statements, "we do not believe any showing of necessity can be made." 329 U.S. at 512-513.

b) The doctrine protects the tangible things sought (written statements, notes, recordings), but not the underlying facts learned. Id. at 504. Accord Appeal of Ingalls Shipbuilding, 73-2 BCA ¶ 10,205 (citing Fed. R. Civ. P. 26 and 33 (requiring responses to interrogatories and requests for admissions regarding opinions and

application of law to facts)).

c) Court acknowledged, contrary to appellate court's opinion, these materials were not covered by A-C privilege, but were protected.

d) The burden of showing necessity is on the discovering party.

3. Subsequent codification. Fed. R. Civ. P. 26(b)(3). ("party may obtain discovery of [materials] prepared in anticipation of litigation of for trial by or for another party or by of for that other party's representatives (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has a substantial need of the materials in he preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by any other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.").

4. Protection does not extend to documents prepared in the normal course of business. E.g., B.D. Click, 83-1 BCA ¶ 16,328.

B. Rationale.

1. It's not Cricket.

a) "In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion . . . . Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." Hickman v. Taylor, 329 U.S. 495 at 510.

b) Sparton, 44 Fed. Cl. 557, 565 (citing United States v. Noble, 422 U.S. 225 91975) ("work product doctrine is a practical one grounded in the realities of litigation in our adversary system.").

2. Promotes full preparation of case - even during a period when discovery

might be feared.

C. Applies to Government. Kaiser Aluminum & Chem. Corp. v. United States, 141 Ct. Cl. 38, 49 (1958).

D. Anticipation of Litigation Must Be A Reasonable Possibility.

1. Deuterium Corp. v. U.S., 19 Cl. Ct. 697 (1990); Appeal of Ingalls Shipbuilding, 73-2 BCA ¶ 10,205 at 48,104.

2. Inquiry should focus on the "primary motivating purpose behind the creation of the document." United States v. Gulf Oil Corp., 760 F.2d 292, 296 (Temp. Emer. Ct. App. 1985).

3. "[T]he mere fact that a [REA] has been filed and is being analyzed does not bring the matter in close enough proximity to litigation to trigger the automatic application of the work product rule . . . . [the] question does not lend itself to hard rules." Appeal of B.D. Click, 83-1 BCA ¶ 16,328.

4. NB: Extends to non-attorneys, but their involvement raises question of whether their work was prepared for litigation or in ordinary course.

E. Waiver.

1. Waiver of attorney-client communication does not necessarily require waiver of work product.

2. Inadvertent disclosure rules apply, but the inadvertent discloser could argue that a complex attorney analysis should be protected on grounds that other party could perform its own analysis.

a) Alaska Pulp v. United States, 44 Fed. Cl. 734 (1999) – inadvertent disclosure did not effect subject matter waiver *vis a vis* similar documents in possession of 3rd party (former expert), because inadvertent disclosure was excused, and furnishing subpoenaed documents to expert alone did not constitute waiver. Applying National Helium Corp., 219 Ct. Cl. 612, court held plaintiff intended to protect and took "adequate steps" to protect document, citing prompt and vigorous assertion of privilege throughout suit, good screening procedures, and "very large" volume of documents (70,000 (document at issue was 100 pages)). Court cited Carter v. Gibbs as "egregious" example of waiver and distinguished inasmuch as there, document was filed in same litigation.

b) McDermott v. United States, No. 93-9C (Fed. Cl.) (unpub'd. order) production of factual interview notes, pursuant to subpoena duces tecum, with small amount of documents, in plain sight, throughout depo, of producing party's attorney, not objected to until half way through examination).

3. Disclosure to expert. See Alaska Pulp, *supra*.

4. Attorney explaining position in pre-litigation discussions.

a) Protected. Sparton Corporation v. United States, 44 Fed. Cl. 557; 1999

IV. GOVERNMENTAL PRIVILEGES.[1]

A. Introduction.

1. Courts generally accept evidentiary privileges "'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" Trammel v. United States, 445 U.S. 40, 50 (1980) (quoting Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

B. State Secrets.

1. The state secret privilege encompasses matters (not just communications) that, if disclosed, would harm the nation's defense capabilities,[2] disclose intelligence gathering methods or capabilities,[3] or disrupt diplomatic

[1] This portion of the outline is excerpted in part from "The Governmental Privileges Outline" (March, 2001), an outline authored by Sandra Spooner, Deputy Director, Commercial Litigation Branch, Civil Division, Department of Justice. This outline does not necessarily represent the views of DOJ.

[2] See United States v. Reynolds, 345 U.S. 1, 6-7, 10 (1953).

[3] See Black v. United States, 62 F.3d 1115 (8th Cir. 1995) (state secret privilege exempted from disclosure information that would confirm or deny alleged contacts with government officers, including identities, nature and purpose of contacts, and locations of contacts), cert. dismissed, 517 U.S. 1154 (1996); Halkin v. Helms ("Halkin II"), 690 F.2d 977, 993 (D.C. Cir. 1982); Halkin v. Helms ("Halkin I"), 598 F.2d 1, 8-9 (D.C. Cir. 1978); Monarch Assurance v. United States, 36 Fed. Cl. 324 (1996) (state secret privilege upheld when confirmation or denial of relationship with CIA would jeopardize intelligence sources and result in loss of intelligence).

relations with foreign governments.[4] See generally Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983), cert. denied sub nom. Russo v. Mitchell, 465 U.S. 1038 (1984).

2. Applicable when "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." Reynolds, 345 U.S. at 10. McDonnell Douglas Corp. v. United States, 37 Fed. Cl. 270 (1996) (state secrets privilege protects classified information re: "stealth" technology in case involving claim of superior knowledge.)

3. It is not necessary to show that harm will inevitably flow from disclosure. Northrop Corp. v. McDonnell Douglas Corp. 751 F.2d 395, 402 (D.C. Cir. 1984). Instead, the government attorney's goal should be to present necessarily "speculative projections" of harm that the court can credit. See generally Ellsberg v. Mitchell, 709 F.2d at 58 n.35.

4. "In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate." Reynolds, 345 U.S. at 11.

5. Once it is established that state secrets are involved, the privilege is absolute. In re United States, 1 F.3d 1251 (Fed. Cir. 1993) (unpublished opinion); Ellsberg v. Mitchell, 709 F.2d at 57.

6. The Supreme Court has made it clear that, when a court is satisfied that production of the evidence will expose matters which should not, in the interest of national security, be divulged, the security of the privilege should not be jeopardized by an examination of the evidence in camera. Reynolds, 345 U.S. at 10.

7. In some cases, the essence of the claim requires an acknowledgement of a secret arrangement, requiring dismissal of the lawsuit, the so-called Totten defense. See Totten v. United States, 92 U.S. 105, 23 L. Ed. 605 (1875). E.g., Air-Sea Forwarders, Inc. v. United States, 39 Fed. Cl. 434 (1997) (oral contract with CIA for "secret services"). But see Monarch Assur. P.L.C. v. United States, 244 F.3d 1356 (Fed. Cir. 2001) (reversing lower court dismissal of claim based on plaintiff's "note" taken in return for alleged loan to CIA, affirming invocation of state secrets privilege, thus precluding access to government information, but permitting plaintiff to

[4] See Halkin II, 690 F.2d at 990 n.53, 993; Attorney General v. The Irish People, Inc., 684 F.2d 928 (D.C. Cir.), cert. denied, 459 U.S. 1172 (1983).

depose others who might be able to establish note signator's authority to bind CIA).

C. Deliberative Process.

1. Applicable to evidence that is: (1) predecisional and (2) deliberative in nature,[5] containing opinions, recommendations, or advice about agency decisions.[6] Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168, 184 (1975); In re Sealed Case, 121 F.3d 729, 735-36 (D.C. Cir. 1997) and cases cited; Walsky Construction Co. v. United States, 20 Cl. Ct. 317 (1990).

2. See also National Wildlife Fed'n. v. Forest Service, 861 F.2d 1114, 1118-19 (9th Cir. 1988) ("recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency," as well as documents that would "inaccurately reflect or prematurely disclose the views of the agency").

3. Factual material that does not reflect deliberative processes is not

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[5] The terms "predecisional" and "deliberative" are discussed at length in Access Reports v. DOJ, 926 F.2d 1192 (D.C. Cir. 1991). The court of appeals suggests that "predecisional" is a threshold requirement that the document, as a whole, play a role in the decision-making process, while "deliberative" refers to that portion of the document which is privileged, i.e., non-factual. Id. at 1195. As to precisely what counts as nonfactual material, the court stated:

> [T]he opinion-fact line that we have often used as a rough guide to separate exempt from non-exempt material grows out of the "deliberative" requirement. . . . The "key question" in identifying "deliberative" material is whether disclosure of the information would "discourage candid discussion within the agency."

Access Report, 926 F.2d at 1192 (quoting Dudman Communications Corp. v. Department of the Air Force, 815 F.2d 1565, 1567-68 (D.C. Cir. 1987)); see also A. Michael's Piano, Inc. v. FTC, 18 F.3d 138, 147 (2d Cir.) ("[A]dvisory reports by individuals without authority to issue final agency dispositions are predecisional."), cert. denied, 513 U.S. 1015 (1994).

[6] In the Freedom of Information Act, Congress codified the deliberative process privilege in Exemption No. 5. See EPA v. Mink, 410 U.S. 73, 86-87 (1973). It provides that FOIA's affirmative disclosure provisions do not apply to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. э552(a)(5).

protected. EPA v. Mink, 410 U.S. at 87-89; Redland Soccer Club, Inc. v. Department of the Army, 55 F.3d 827, 854 (3d Cir. 1995), cert. denied, 516 U.S. 1071 (1996); Gould, Inc., ASBCA No. 46759, 96-2 B.C.A. (CCH) P28,521 (OMB memo discussing CAS decision after the fact was factual and not predecisional).

4. Unlike the state secrets privilege, the deliberative process privilege is not absolute. Redland Soccer Club, Inc. v. Department of the Army, 55 F.3d 827, 853 n.18 (3d Cir. 1995), cert. denied, 516 U.S. 1071 (1996). After concluding that the privilege is properly invoked, the court must balance the public interest in nondisclosure with the individual need for the information as evidence. Redland Soccer Club, Inc., 55 F.3d at 854; Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 788, 791 (D.C. Cir. 1971).

   a) E.g., Dominion Cogen, D.C., Inc. v. District of Columbia, 878 F. Supp. 258, 268 (D.D.C. 1995) (an exception to the deliberative process privilege exists where "the deliberative process itself [is] directly in issue").

5. Federal Circuit recognition.

   a) First recognized in Kaiser Aluminum & Chemical Corp. v. United States, 141 Ct. Cl. 38, 49, 157 F. Supp. 939, 946 (1958) ("So far as the disclosure of confidential intra-agency advisory opinions is concerned, we conclude that they belong to that class of governmental documents that are privileged from inspection as against the public interest but not absolutely").

   b) In Zenith Radio Corp. v. United States, 764 F.2d 1577, 1580 (Fed. Cir. 1985), the Federal Circuit recognized the deliberative process privilege, under the name "executive privilege," stating: "The executive privilege . . . protects agency officials' deliberations, advisory opinions and recommendations in order to promote frank discussion of legal or policy matters in the decision-making process." See Abramson v. United States, 39 Fed. Cl. 290, 293 (1997); Vons Companies, Inc. v. United States, 51 Fed. Cl. 1 (2001).

      (1) The practical effect of recognizing the deliberate process privilege as an “executive” privilege is that the privilege must formally be invoked by the head of the agency with control over the document. Id.; CACI Field Servs. v. United States, 12 Cl. Ct. 680, 686-87 & n.7 (1986), aff'd.,

854 F.2d 464 (Fed. Cir. 1987).

(2) Courts interpret "head of agency" broadly. See Landry v. Federal Deposit Insurance Corporation, 204 F.3d 1125, 135 (D.C. Cir. 2000). See also Kirk D. Jensen, The Reasonable Government Official Test: A Proposal for he Treatment of Factual Information Under the Federal Deliberative Process Privilege, 49 Duke L.J. 561 (1999).

6. Rationale.

a) "Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act." Kaiser Aluminum & Chemical Corp. v. United States, 157 F. Supp. 939, 945-46 (Ct. Cl. 1958).

b) Disclosure of inter-agency and intra-agency deliberations and advice is injurious to the federal government's decision-making functions because it tends to inhibit the frank and candid discussion necessary to effective government. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150-51 (1975) (recognizing deliberative process privilege as an executive privilege); EPA v. Mink, 410 U.S. 73, 87 (1973).

7. Assertion of Privilege.

a) Formal assertion of privilege.

(1) Must be made by head of the agency that has control over the requested information.

(2) Must state with particularity what information is subject to the privilege.

(3) Must supply court with "precise and certain reasons" for maintaining the confidentiality of the requested document [or information]. Walsky Construction Co. v. United States, 20 Cl. Ct. 317 (1990).

b) If challenged, government must prove: 1) information is pre-decisional, i.e., there must be a decision; 2) information is

"deliberative," i.e., contains opinions or recommendations.

(1) Thus, factual information not subject to the privilege.

c) The privilege is not absolute and may be "overcome upon a showing of evidentiary need weighed against the harm that may result from disclosure." CACI Field Servs. V. United States, 12 Cl. Ct. 680, 687(1986), aff'd., 854 F.2d 464 (Fed. Cir. 1987).

8. Examples.

a) Deliberations concerning whether to initiate litigation. United States v. Farley, 11 F.3d 1385, 1389 (7th Cir. 1993) (referral memorandum from FTC to DOJ).

b) "Discussions among agency personnel about the relative merits of various positions which might be adopted in contract negotiations are as much a part of the deliberative process as the actual recommendations and advice agreed upon." Mead Data Central, Inc. v. Air Force, 566 F.2d 242, 257 (D.C. Cir. 1977).

c) Jowett, Inc. v. Department of the Navy, 729 F. Supp. 871, 877 (D.D.C. 1989) (Navy audit report predecisional).

d) Drafts of decisions are almost always considered privileged. They represent the personal opinion of the author, not yet adopted as the final position of the agency. Thus, by their nature, they are deliberative. Lead Industry Ass'n., Inc. v. OSHA, 610 F.2d 70, 86 (2d Cir. 1979); Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 13 (D.D.C. 1995), aff'd, 76 F.3d 1232 (D.C. Cir. 1996); Grossman v. Schwarz, 125 F.R.D. 376, 385 (S.D.N.Y. 1989) (Lee, Mag.).

D. Others.

1. Confidential Informant.

a) Applicability.

(1) Allows the Government to withhold the identity of persons who furnish information about violations of the law to officers charged with law enforcement. Roviaro v. United States, 353 U.S. 53 (1957).

(2) Does not protect the information disclosed unless its

disclosure would reveal identity, Roviaro, 353 U.S. at 60.

(3) [A] source may be considered confidential "if the informant's relation to the circumstances at issue supports an inference of confidentiality." Cofield v. LaGrange, 913 F. Supp. 608, 618 (D.D.C. 1996) (citing Department of Justice v. Landano, 508 U.S. 165 (1993)). "[C]ourts may look to the risks an informant might face were her identity disclosed, such as retaliation, reprisal or harassment, in inferring confidentiality." Massey v. FBI, 3 F.3d 620, 623 (2d Cir. 1993). "An employee-informant's fear of employer retaliation can give rise to a justified expectation of confidentiality." United Technologies v. NLRB, 777 F.2d 90, 94 (2nd Cir. 1985). In addition, "serious and damaging allegations of misconduct that could initiate criminal investigations or lead to other serious sanctions can reflect an implied assurance of confidentiality." Ortiz v. DHHS, 70 F.3d 729, 734 (2d Cir. 1995), cert. denied, 517 U.S. 1136 (1996).

(4) E.g., R.C.O. Reforesting v. United States, 42 Fed. Cl. 405 (1998) (implied assurance of confidentiality when informants' communications led to a criminal investigation of the company by whom they were employed).

b) Privilege is qualified.

(1) Government must show that its interest in effective law enforcement outweighs the litigant's need for the information.[7] Roviaro v. United States, supra;

2. Investigatory Files.

a) Applicability.

[7] See, e.g., Rovario v. United States, 353 U.S. 53, 60-61 (1957) (if disclosure is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way"); United States v. Gutierrez, 931 F.2d 1482, 1490-91 (11th Cir.), cert. denied, 502 U.S. 916 (1991)(Government was not required to disclose informant's identity because he was always with at least one agent who could testify to everything that occurred except for a few instances, and because Government's affidavit indicated that threats had been made against informant); United States v. Smith, 780 F.2d 1102 (4th Cir. 1985).

(1) Protects investigatory files compiled for law enforcement purposes. Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1341 (D.C. Cir. 1984); Black v. Sheraton Corp. of America, 564 F.2d 531 (D.C. Cir. 1977).[8]

b) Rationale.

(1) Disclosure of investigatory files would undercut the Government's prosecution by disclosing investigative techniques, forewarning suspects of the investigation, deterring witnesses from coming forward, and prematurely revealing the facts of the Government's case. In addition, disclosure could prejudice the rights of those under investigation. 40 Op. A.G. 45 (1941).

c) Privilege is qualified.

(1) Can be overcome if a litigant's need is sufficiently great.

(2) See Friedman v. Bache Halsey Stuart Shields, 738 F.2d 1336, 1341 (D.C. Cir. 1984) (setting out factors to consider: (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available

[8] See also Exemption 7 of the FOIA. 5 U.S.C. ə552(b)(7). Exemption 7 covers "records or information compiled for law enforcement purposes" under six specified conditions. DOJ v. Landano, 508 U.S. 165 (1993); John Doe Agency v. John Doe Corp., 493 U.S. 1064 (1989) (exemption for law enforcement records does not require that the records be originally compiled for law enforcement purposes).

through other discovery or from other sources; and (10) the importance of the information sought to the plaintiff's case).

3. Privilege For Information Given To The Government On A Pledge Of Confidentiality.

a) Applicability.

(1) United States v. Weber Aircraft Corp., 465 U.S. 792, 801 (1984) (while Exemption 5 of the FOIA might not implicate "novel" privileges, it certainly covers "well-settled" privileges like the one protecting confidential statements made to accident investigators). See generally Badhwar v. Department of the Air Force, 829 F.2d 182 (D.C. Cir. 1987).

b) Rationale.

(1) "[W]hen discovery of investigative reports obtained in large part through promises of confidentiality would hamper the efficient operation of an important Government program and perhaps even as the Secretary here claims, impair the national security by weakening a branch of the military, the reports should be considered privileged." Machin v. Zuckert, 316 F.2d 336, 339 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963), cited with approval in United States v. Weber Aircraft Corp., 465 U.S. 792, 796 (1984).

c) Privilege is qualified.

(1) Can be overcome by a strong showing of need. Machin v. Zuckert, 316 F.2d at 339.

(2) Must be lodged formally by the head of the relevant agency. AWIS, 566 F.2d at 347.

E. Issues With Governmental Privileges.

1. Sufficiency of the Affidavit.

a) For state secrets privilege: "[1] There must be a formal claim of privilege, [2] lodged by the head of the department which has control over the matter, [3] after actual personal consideration by

that officer." Reynolds, 345 U.S. at 7-8. See also Monarch Assurance v. United States, 36 Fed. Cl. 324, 326 (1996) (affidavit required from Director of Central Intelligence; affidavit from Associate Deputy Director for Operations of the CIA not sufficient).

b) Almost all courts require that any claim of governmental privilege be accompanied by an affidavit from the head of the agency that has control over the documents. See United States v. Reynolds, 345 U.S. at 7-8; Zuckerbraun v. General Dynamics Corp., 935 F.2d 544, 546 (2d Cir. 1991); CACI Field Services, 12 Cl. Ct. 680, 687 (1987).

c) Affidavit not required until matter placed before court by motion to compel motion for a protective order. In re Sealed Case, 121 F.3d 729, 741 (D.C. Cir. 1997) (White House was not obliged to "formally invoke its [executive] privileges in advance of the motion to compel;" it was sufficient that it said, in response to a subpoena, that it "believed the withheld documents were privileged."). Accord Abramson v. United States, 39 Fed. Cl. 290, 294 n.3 (1997)("procedural requirements generally are satisfied through the production of a declaration or affidavit by the agency head . . . in response to a motion to compel.").

2. Content of affidavit.

a) Affiant's credentials, description of documents, statement that affiant has personally reviewed them,[9] claim of privilege.

b) Object is to avoid in camera inspection. Thus, specificity of description of documents is critical.

3. Comparisons to the Freedom of Information Act.

a) The Freedom of Information Act, 5 U.S.C. §ə 552(b), provides that the Government "shall make available to the public," upon demand, agency records not falling within certain specified exemptions. In many instances, the exemptions are analogous to the governmental discovery privileges.[10]

[9] For a case in which the court concluded that the agency's affiant had not, in fact, conducted the requisite personal review, see Yang v. Reno, 157 F.R.D. 625 (M.D. Pa. 1994).

[10] See Note, Discovery of Government Documents and the Official Information Privilege, 76

b) There also are significant differences between the FOIA and the evidentiary privileges applicable to the Executive Branch.[11] Accordingly, care must be exercised in relying upon principles that underpin FOIA rulings.[12]

(1) Cases construing Exemption (b)(5) are authoritative with respect to the deliberative process privilege because the exemption specifically provides that inter- and intra-agency memos are available under FOIA to the same extent they would be available in litigation. See NLRB v. Sears, Roebuck & Co., 421 U.S. at 149 n.16 (1975).

c) "FOIA neither expands nor contracts existing privileges, nor does it create any new privileges." Association for Women in Science v. Califano, 566 F.2d 339, 342 (D.C. Cir. 1977).

d) Discovery rules are applied to FOIA decisions only by "rough analogies." EPA v. Mink, 410 U.S. at 86. Differences include the fact that, in discovery matters, the courts consider the needs of the requesting party. That assessment is not part of the FOIA analysis. North v. Walsh, 881 F.2d at 1095; Baldridge v. Shapiro, 455 U.S. 345, 360 n.15 (1982)

4. Waiver.

a) Because "executive privilege exists to aid the governmental decisionmaking process, a waiver should not be lightly inferred." In re Sealed Case, 121 F.3d 729, 741 (D.C. Cir. 1997) .

b) Thus, the rule applied to many privileges that disclosure is a waiver, not only as to the disclosed document, but also as to all related documents, "has not been adopted with regard to executive

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Colum. L. Rev. 142, 152 (1976).

[11] See Culinary Foods, Inc. v. Raychem Corp., 150 F.R.D. 122 (N.D. Ill. 1993), for a discussion of the distinctions between civil discovery and access to government information under FOIA.

[12] Most courts have held that the FOIA exemptions do not create "privileges" within the meaning of the Federal Rules of Civil Procedure. See Baldridge v. Shapiro, 455 U.S. 345, 360 n.15 (1982).

privileges generally, or to the deliberative process privilege in particular. Instead, courts have said that release of a document only waives these privileges for the document or information specifically released, and not for related materials." In re Sealed Case, 121 F.3d at 741, and cases cited.

V. ASSERTING/RESISTING PRIVILEGES.

A. Pre-litigation Planning/ Litigation Administration.

1. Control Your Forces.

a) Ensure those working on the litigation know the "rules of engagement."

b) Ensure "interested persons" not working on the litigation know the rules.

c) Leaks - limit disclosures from litigation to non-litigation personnel.

d) Establish permissible lines of communication and limits on intra-team communications (if an agency analyst/attorney discloses information or shares documents with a testifying expert, including DCAA, warn the analyst that s/he might as well make a copy right then and there for opposing counsel).

e) Understand that nondisclosure is not the goal of litigation and that efficient work practices may entail an acceptable level of risk of disclosure. Just ensure everyone knows the risk exists.

2. Mark Documents.

a) Issue written instructions.

b) Purpose.

(1) Prevent inadvertent disclosure.

(2) Assist those reviewing for privilege.

3. Identify who the attorneys were/are.

4. Document the anticipation of litigation and purpose of pre-litigation work product.

B. Authority. Make sure you have it (to waive or assert).

C. Privilege Logs.

1. "When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to asses the applicability of the privilege or protection." Fed. R. Civ. P. 26(b)(5).

2. The applicability of a privilege "turns on the adequacy and timeliness of the showing as well as on the nature of the document," and a failure to make a clear showing that a privilege applies is "not excused because the document is later shown to be one which would have been privileged if a timely showing had been made." Cabot v. United States, 35 Fed. Cl. 442, 44 (1996) (quoting Peat Marwick, Mitchell & Co. v. West, 748 F.2d 540, 542 (10th Cir. 1984).

3. Provide sufficient information to describe documents uniquely (normally date, to/from, serial number, and/or title/subject).

a) If privilege is applicable equally to each document in a collection or series, identification of collection or series should suffice.

4. Provide sufficient information to substantiate the privilege, e.g., "To John Smith, Attorney."

5. Ensure that the log or description itself does not reveal what you are trying to protect or otherwise invite unwanted attention.

D. Redaction.

1. When privileged matter is severable, e.g., handwritten notes on an otherwise non-privileged document, redact the privileged material, and produce the document. E.g. Sierra Rock v. Regents of Univ. of California, EBCA No. C-9705223, 98-2 BCA & 30,083.

E. In Camera Inspection.

1. Ellsberg v. Mitchell, 709 F.2d at 63-64 ("before conducting an in camera examination of the requested materials, the trial judge should be sure that the government has justified its claims in as much detail as is feasible (and would be helpful) without undermining the privilege itself").

2. Error to release following in camera inspection when no prima facie showing by nonprivileged evidence sufficient to show need for such an inspection. United States v. De La Jara, 973 F.2d 746 (9th Cir. 1992). Accord Linder v. NSA, 94 F.3d 693, 696-97 (D.C. Cir. 1996) (if agency meets its burden through affidavits, in camera inspection is neither necessary not appropriate); Xerox Corp. v. U.S., 12 Cl. Ct. 93, 95 n.3 (1987); Appeal of Federal Data Corp., DOTBCA No. 2389, 91-3 BCA & 24,063.

3. In camera inspection "not automatic" and "possibly a dilution of a properly asserted privilege." Appeal of B.D. Click, 83-1 BCA ¶ 16,328 (ordering in camera inspection where requesting party would require "clairvoyance" to respond to privileged party's affidavit concerning the material, and allegations of fraud and conspiracy made document potentially relevant ").

   a) amount of detail in affidavit in support of privilege may preclude this sort of situation.

4. If you lose the in camera battle, recusal?

F. Protective Orders.

1. Rule 26(c) - "any order that justice requires to protect from annoyance, embarrassment, oppression, or undue burden or expense."

2. Fashion orders to limit further disclosure of documents.

3. Limits may concern: place of review, copying of documents, who may review, disposition of documents after litigation, special marking of documents, and certificates of non-use/non-disclosure of protected materials.

G. Resisting An Assertion Of Privilege.

1. Can the privilege be assessed from the log? Was one produced?

2. Does it clearly meet the standard of proof for the privilege claimed? E.g., is the author/recipient of the communication entitled to the protection?

3. Did the owner claim (was it properly asserted?).

4. Did the owner waive?

5. Is the privilege qualified?

    a) Does the claim serve the principle giving rise to the privilege?

    b) Are your clients needs greater?

6. Demand an in camera inspection.

7. Are there alternatives sources of the information?

8. Will a redaction or protective order obviate the privilege?

9. Horse trade.

VI. SELECTED PROBLEMS

A. Experts.

B. DCAA.